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IN THE

# Supreme Court of the United States

**October Term, 1963**

**No. 50**

MORRIS GOTTHILF,

*Petitioner,*

*against*

BENJAMIN SILLS, MORTON SILLS and SILLS OF CAMBRIDGE, INC.,

*Respondents.*

**On Writ of Certiorari to the**
**NEW YORK SUPREME COURT**
**Appellate Division, First Judicial Department**

## RESPONDENTS' BRIEF

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**On Writ of Certiorari to the NEW YORK SUPREME COURT Appellate Division, First Judicial Department**

## RESPONDENTS' BRIEF

### Proceedings Below

The petitioner, Gotthilf, was Chairman of the Board of Charge-It-Systems, Inc., a New York Corporation, which was the factor of respondent, Sills of Cambridge, Inc. The individual respondents, Benjamin Sills and Morton Sills were the principal officers and stockholders of Sills of Cambridge, Inc.

On September 24, 1959, the respondents were in debt to the United States for withholding taxes. The individual respondents were, in addition, guarantors of a debt owing from Sills of Cambridge, Inc. to Charge-It-Systems, Inc. There was a controversy as to the balance due to Charge-It-Systems, Inc.

To resolve this dispute Charge-It-Systems, Inc. by Gotthilf, the Chairman of its Board, entered into a written agreement with Benjamin Sills and Morton Sills (R. 31-33); Charge-It-Systems, Inc. undertook to accept $13,000. in full settlement of its claim against the respondents, such sum to be paid in installments, $2,500. forthwith and the balance in ten equal monthly payments.

In this written agreement, Gotthilf, Chairman of the Board, represented that Charge-It-Systems, Inc. had submitted this settlement arrangement to the Internal Revenue Service and agreed that the outstanding accounts receivable of Sills of Cambridge, Inc. would be collected by Charge-It-Systems, Inc., that such collections would be remitted to the Internal Revenue Service once a month and that the amount collected would be reported to the Internal Revenue Service twice a month.

This letter agreement acknowledged that the factor was holding $28,319.28 of accounts receivable as collateral and stipulated that Charge-It-Systems, Inc. would transfer to Morton and Benjamin Sills all unpaid accounts receivable held as collateral and outstanding at the time the $13,000 should be paid in full (R. 31-33).

The $13,000. was duly paid by Morton and Benjamin Sills (R. 8).

Charge-It-Systems, Inc. collected the accounts receivable. Once a month it sent to Sills of Cambridge, Inc.

what appeared to be copies of letters (R. 34-36) addressed to Nathan Sprintzen, Chief Special Procedure Section of the Internal Revenue Service in New York City. These letters purported to enclose remittances to The Internal Revenue Service pursuant to a letter of September 22, 1959 (R. 8).

It is a fact, nowhere contradicted, that the Internal Revenue Service had no record of a letter of September 22nd, 1959, nor of the agreement of September 24, 1959 (R. 8).

Further, the Internal Revenue Service never received the originals of the copies of letters from Gotthilf, Chairman of the Board. Finally, it never received one single payment from Gotthilf, or Charge-It-Systems, Inc. (R. 8).

Benjamin Sills, Morton Sills and Sills of Cambridge, Inc. thereupon instituted an action against Charge-It-Systems, Inc. and Morris Gotthilf in the Supreme Court, New York County, seeking to recover damages for fraud (R. 8).

The answer (R. 40) asserted affirmative defenses and counterclaims, but by failing to deny, admitted that the covering letters and remittances were never sent to the Internal Revenue Service.

Plaintiffs' Reply (R. 43, 44) denied the affirmative allegations of the answer.

Plaintiffs thereafter served a notice to examine Charge-It-Systems, Inc. and Morris Gotthilf before trial returnable October 27, 1960. The defendants defaulted.

Plaintiffs' attorney telephoned Archibald Palmer, defendants' then attorney, during the course of the day and was told that defendants had not appeared because they did not intend to take further action in the case.

Plaintiffs' attorney duly served a notice of motion to strike the answer and counterclaims of defendants because of their deliberate default. The defendants defaulted on the return day.

On November 16, 1960, an order was duly made striking the answer and counterclaims. A copy of this order was duly served on defendants' attorney.

Thereafter plaintiffs' attorney served defendants' attorney with a notice of motion for an inquest in this action, returnable January 9, 1961. Defendants defaulted on January 9, 1961.

An order was then made setting the case down for inquest and a copy was duly served on defendants' attorney with a notice of inquest for February 9, 1961.

At this point the defendants, appearing by Mr. Palmer, moved to vacate the order directing an inquest. His preposterous contention that plaintiffs' attorney had agreed orally to take no further action against the petitioner, Gotthilf, was not accepted by the Court. The application was denied on March 10, 1961.

Plaintiffs then appeared in the Supreme Court, New York County, on May 9th, 1961, to proceed with the inquest (R. 5). The date had been delayed because adjournments had been requested by Mr. Palmer, who represented that his client, Gotthilf, was travelling out of the country.

The inquest was taken before Mr. Justice Carney. Mr. Palmer, defendants' attorney, personally appeared in Court. He was afforded the opportunity to participate in the proceedings. He refused to take part and left the courtroom (R. 8).

After hearing the testimony of Benjamin Sills and Nathan Sprintzen of the Internal Revenue Service, Justice

Carney awarded plaintiff, Sills of Cambridge, Inc. damages in the sum of $17,408.77 for defendants' fraud and deceit (R. 8), and a judgment was accordingly entered for that sum plus interest, costs and disbursements, in the total sum of $19,294.38 (R. 5).

Defendants then appealed from this judgment to the Appellate Division of the Supreme Court, New York County. The notice of appeal was served and filed by Mr. Palmer on their behalf. The judgment was affirmed without opinion (R. 11).

An execution was thereupon issued against the property of the petitioner and his co-defendant. It was returned unsatisfied (R. 5).

Thereafter the judgment-creditor (respondent here) moved for a body execution upon the petitioner. Notice was duly given the petitioner, his former attorney and his present attorney (R. 4). The motion came on before Justice Abraham J. Gellinoff, at Special Term of the Supreme Court, New York County. Affidavits were submitted and the issues were argued. The Court rendered an opinion (R. 44, 45) which stated in part: "Although he appeals to the discretion of the court, defendant has neglected to bare completely his present financial status and future prospects and to present any plan for payment of the judgment. The defendant will be granted an opportunity to do so by filing an additional affidavit on or before February 21, 1962. If no such affidavit is filed or if the affidavit when filed, does not appeal to the discretion of the court, the motion for the issuance of a body execution will be granted" (R. 44).

The petitioner did submit an additional affidavit (R. 21, 22). Moreover, at his request, Judge Gellinoff granted

him a further hearing at which he, his wife, his counsel and respondents' attorney were present.

Justice Gellinoff found that defendant had not convinced the court of any meritorious ground for withholding issuance of a body execution. The motion was accordingly granted and an order entered (R. 3-4).

Petitioner appealed from this order to the Appellate Division of the Supreme Court, First Department, which unanimously affirmed. Then, without asking leave either of the Appellate Division or the Court of Appeals, and without following the custom of having the question certified as one of an important constitutional nature, petitioner appealed to the Court of Appeals which dismissed his appeal because it was not an appeal from a final order (R. 2).

## Statement of the Case

The order for a body execution, arising from this judgment for fraud, was issued in the discretion of the Court primarily because of the contemptuous conduct of the petitioner, Gotthilf. There is not the slightest doubt that if Gotthilf had made an honest disclosure, there would have been no order for a body execution. He literally invited such action by the Court.

Mindful that he could offer no defense to the charges of fraud asserted in the complaint without the risk of perjury, Gotthilf had deliberately suffered the defaults which have been enumerated. These defaults were calculated to serve as a basis for delay and evasion. And this course of conduct was constantly maintained by him in the proceedings for a body execution before Justice Gellinoff.

The order for a body execution did not follow automatically upon respondents' request. Affidavits were submitted by both sides and argument heard by the Court to determine whether its discretion should be exercised in favor of the application for body execution. Gotthilf swore that he would be "present and available" (R. 15) for examination in supplementary proceedings (although he has since fled the State and has been securely ensconced in Florida for many months), but offered no evidence as to his financial status or his ability or inability to pay, although then represented by new counsel.

Justice Gellinoff afforded Gotthilf a further opportunity to satisfy the Court that he was acting in good faith with the Court. Thereupon Gotthilf finally produced an affidavit (R. 21) which recited that he was without assets except income from his business. This president of the Enrolled Accountants Association of the State of New York (R. 15) averred that his net income had been $19,253.18 in 1959, $11,543.30 in 1960. There was apparently no income and an unexplained deficit of $4,523.72 in 1961. There was income of $3,177.54 in the first two months of 1962. He offered to pay 25% of his net income (R. 22) beginning two months thence, namely, April 1962, and added: "If my offer of 25% of my net income is not high enough in the Court's opinion, then I will try to comply with what the Court suggests."

His affidavit did not disclose the sources of his income, the existence of any favorable contracts, his bank accounts, his mode of living, how he paid rent for the apartment in which he lived nor did he disclose his possessions. He offered no explanation of what he had done with the $3,000 earned in January and February 1962, or of how he had

found the money to travel abroad. Gotthilf's affidavits were not candid. They were not honest. His proposal would have placed on the judgment creditors the burden of pursuing him each month, causing further and interminable dispute in the monthly computation of 25% of his net income. His invitation to the Court to suggest a higher offer was typically arrogant and cavalier. This was no honest debtor truthfully disclosing his assets. Gotthilf proposed to enter into a game with the Court and Justice Gellinoff properly declined the invitation. This contemptuous conduct under all the circumstances, fully warranted the order for a body execution.

The petitioner concedes at page 40 of his brief, as well he must, that Justice Gellinoff did not abuse his discretion under the law of the State of New York. To deny this right to the Court under these circumstances would be to rob it of a fundamental and necessary power.

## Question Presented

The question presented is not, as stated by the petitioner, the simple issue of whether a body execution to enforce collection of a debt violates the due process clause.

It is rather: Is the due process clause violated by Section 764 of the New York Civil Practice Act as applied in the instant case where the judgment was founded in fraud and where the debtor has refused to make an honest, complete disclosure of his assets and earnings in defiance of the Court.

## Summary of Argument

I. Section 764 of the New York Civil Practice Act provides for a body execution in the Court's discretion in cases of fraud. This is a reasonable remedy to a defrauded creditor.

A. Section 764 of the Civil Practice Act as applied by the New York Courts and in this case, does not impose imprisonment for debt.

B. The granting of a body execution against a judgment-debtor in an action based on fraud, is not considered imprisonment for debt.

II. The due process clause of the Fourteenth Amendment does not apply.

A. Those practices which have been declared contrary to due process are radically different from the instant procedure.

B. Procedures like the instant one, which are consistent with a State's needs and which are based on a tradition which continues to have present validity are not unconstitutional.

III. New York's procedure is in accord with Federal policy.

A. The Federal law of imprisonment for debt in the Federal Courts, follows the remedies provided by the States.

B. A procedure very similar to the instant one has been accepted by the Supreme Court in its supervision over the Federal Bankruptcy Courts.

C. The Supreme Court has refused to alter State remedies, which have a strong local purpose, even when it has been alleged that they conflict with Federal policy.

IV. The petitioner has failed to exhaust the remedies available to him under New York Law.

# ARGUMENT

## POINT I

**Section 764 of the New York Civil Practice Act provides for a body execution in the Court's discretion in cases of fraud. This is a reasonable remedy to a defrauded creditor.**

### A. Section 764 of the Civil Practice Act as applied by the New York Courts and in this case, does not impose imprisonment for debt.

Between 1874 and 1936 execution against the person of a judgment-debtor was allowed in New York in certain actions simply by the order of the plaintiff's attorney and without any need for a Court application or hearing. *Williams* v. *Smith*, 171 Misc. 501, 502, 12 N. Y. S. 2d 124, 125 (N. Y. C. Ct. 1939). In 1936, Section 764 was amended to require application to the Courts for this remedy which was to be granted on the same grounds as before except that the application was to include "such other matters as the Judge, Justice or Court issuing the same may require." New York Civil Practice Act Sec. 764 as amended New York Laws of 1936 Chapter 279. Some Courts interpreted this difference to mean that the application was to be granted or denied according to the Court's "sound discretion". However, the weight of authority was that the amendment in Section 764 was only meant to prevent the abuse of process which had occurred when executions were in the hands of attorneys and was not meant to give a Judge the discretion to deny the body execution in any case where it was authorized by statute. *White* v. *Denny*, 258 App. Div. 144, 15 N. Y. S. 2d 849 (1st Dept. 1939).

In 1940 Section 764 was again amended to its present form which provides for the exercise of judicial discretion. New York Civil Practice Act Sec. 764 as amended New York Laws of 1940 Chapter 552. This amendment was construed to have changed the rule of *White* v. *Denny*, *supra*, and to have given the Courts the duty to look into all pertinent circumstances including the judgment-debtor's ability to pay his obligation and the nature of the wrong for which the judgment had been recovered. In *Spruce* v. *Aronson*, ..... Misc. ..... ; 43 N. Y. S. 2d 958 (S. Ct. 1943), it was stated that "It is not the purpose of a body execution to enforce the collection of a debt by imprisonment" and that such an execution would be denied in the Judge's discretion when "The judgment was not obtained as a result of a malicious, wanton or intentional injury." In *Zeidner* v. *Sakal*, 194 Misc. 642, 90 N. Y. S. 2d 461 (S. Ct. 1949), although a body execution was denied, leave was given to the plaintiff to apply later if the defendant showed "unco-operative, obstructive or other prejudicial conduct."

The trend in New York public policy, as evidenced by the change in Section 764 against imprisoning persons for obligations which they were incapable of discharging was noted in *Application of Chassman*, 1 Misc. 2d 766, 147 N. Y. S. 2d 765 (C. Ct. 1955) where the Court refused to imprison an indebted trustee for contempt. The Judge relied on the judicial construction of Section 764 to make inability to comply the significant factor in the exercise of his discretion not to imprison the defendant. In *American Guar. and Liab. Ins. Co.* v. *Conran*, ..... Misc. ....., 140 N. Y. S. 2d 333 (S. Ct. App. Term 1955) where it was found that the defendant could pay fifty dollars a month instead of the twenty-five he was then paying, the Court

allowed a body execution in its discretion unless the defendant paid the larger amount.

Thus it can be seen that Section 764, as construed by the New York Courts, does not authorize a body execution in cases where the defendant is incapable of paying but only in cases where he is found to be engaging in practices which show an absence of good faith in his dealings with the judgment-creditor.

The case now before the Court does not show any deviation from this rule. The defendant was given ample opportunity to act in good faith with the Court and his creditor (R. 44, 45). The Special Term Justice, who had an opportunity to observe the attitude and demeanor of the defendant decided that he was not acting in good faith and was concealing the nature and amount of his assets (R. 45). The Appellate Division unanimously affirmed the trial justice's opinion and the exercise of his discretion (R. 46).

It cannot be said that the body execution simply issued to enforce the collection of a debt. It issued because the Special Term Justice found no merit to the defendant's position and disbelieved his assertion concerning his property. In this sense the execution was in the nature of a civil contempt order. When a body execution is issued as a matter of right without a Court having the obligation to look into the debtor's ability to pay, then it is simply to enforce the collection of a debt and imprisonment is used as a coercive measure in a matter which is strictly between two private parties.

However, once the Court is given the discretion to look into the matter and the course of the law provides that

imprisonment will not be ordered if the defendant cannot pay and has not wrongfully concealed his assets and has made a full and complete disclosure to the Court. The Judge may issue the execution only for what it considers a lack of good faith and respect in a matter which is no longer between two private persons but now involves the Court. It is this which makes the order for imprisonment more a committal for contempt than a traditional body execution even though the old terms continue to be used.

**B. The granting of a body execution against a judgment-debtor in an action based on fraud is not considered imprisonment for debt.**

The Constitutions or Statute law of almost all of the States have abolished imprisonment for debt. 16 C. J. S. 1004 (1956); NOTE, Present Status of Execution against the Body of the Judgment Debtor, 42 Iowa L. Rev. 306, 307-11 (1957). It has been generally agreed among Courts of the Several States that the provisions abolishing imprisonment for debt "were adopted to protect the poor but honest debtor who is unable to pay his debts and were not intended to shield a dishonest man who takes unconscionable advantage of another". *In re Trombley*, 31 Cal. 2d 801, 809, 193 P. 2d 734, 740 (1948). Thus it has been generally agreed that the "debts" for which imprisonment is forbidden are those which have arisen from contractual arrangements and not those which are based on damages recovered in actions ex delicto, 21 Am. Jur. 331 (1939); NOTE, Constitutionality of imprisonment for Debt, L. R. A. 1915 B 646.

There has been a concern in many of the commercial jurisdictions for giving a defrauded creditor as well as the State a remedy against a fraudulent debtor. This is even reflected in the Federal Bankruptcy Act which refuses to allow a bankrupt to discharge his fraudulent debt, 11 U. S. C. Sec. 35(a) (2), (4) (1958); *Forsyth* v. *Vermeyer*, 177 U. S. 177 (1900). It is singularly noteworthy that Mr. Justice Jackson found it pertinent to remark that "fraudulent bankruptcies probably present more difficulties to the Courts in the Second Circuit than elsewhere." *Maggio* v. *Zeitz*, 333 U. S. 56 at 58 (1948).

In the Constitutional guaranties against imprisonment for debt almost half of the States specifically exclude cases of fraud. NOTE, 42 Iowa L. Rev. 306, 308 n. 18. Indeed the statute of England, which abolished that imprisonment for debt, explicitly refused to give the fraudulent debtor the benefit of its provisions. 32 and 33 Vict. Chapter 62 (1868). The protection of deceived creditors and the deterrence of fraud have been said to lie at the foundation of a State's decision to give the defrauded creditor this remedy. Unless such creditors are protected, the fraudulent debtor is likely to have less respect for the law and the judgment against him; and by his failing to act in good faith, the judgment becomes a mere piece of paper, and the Court's authority a mockery. Bushman and Mayersohn, Civil Arrest and Execution Against the Person, 12 Albany L. Rev. 17, 32 (1948); *Reeves* v. *Crownshield*, 274 N. Y. 74, 78-80, 8 N. E. 2d 283, 284-85 (1937).

Considering the exclusion of cases of fraud from many constitutional or statutory guaranties against imprisonment for debt and the rationale of protection and deterrence behind this, it is difficult to see how Section 764 can be

characterized as a denial of due process of law. "The tyranny of labels" Justice Cardozo wrote in *Palko* v. *Connecticut*, 302 U. S. 319, 323 (1937) "must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other." Even if the imprisonment of persons only for their fraudulent debts violated due process (see *Tatlow* v. *Bacon*, 101 Kan. 26, 165 Pac. 835 (1917)), New York and many other jurisdictions which provide for body execution will not allow the imprisonment of anyone who is incapable of discharging his debt. *McDonnel* v. *Wayne*, 222 Mich. 516, 522, 193 N. W. 283, 285 (1923); Buschman and Mayersohn, 12 Albany L. Ref. 17 at 34, 37.

## POINT II

### The due process clause of the Fourteenth Amendment does not apply.

#### A. Those practices which have been declared contrary to due process are radically different from the instant procedure.

Stated generally, the Supreme Court has only found as unconstitutional, under the due process clause of the Fourteenth Amendment, practices which "violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Palko* v. *Connecticut*, 302 U. S. 319 at 325-26. It has upheld all exercises of state power which are consistent with the "fundamental principles of liberty and justice which lie at the base of our civil and political institutions." *Palko* v. *Connecticut*, *supra*, at 328. This has been a difficult test to apply but

as Mr. Justice Cardozo remarked in outlining this test "there emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence". *Palko* v. *Connecticut*, *supra*, at 325.

The application of the due process clause of the Fourteenth Amendment has not remained the same but has changed over the years to reflect the shifting mores and ideals of a democratic society. Due process has come to mean more than simply an orderly course of proceedings before an impartial judge, *Tumey* v. *Ohio*, 273 U. S. 510 (1927) and freedom from physical torture, *Brown* v. *Mississippi*, 297 U. S. 278 (1936) and a biased jury (*Irvin* v. *Dowd*, 366 U. S. 717 (1961). For instance, when it has been found that the right to be protected against unreasonable searches and seizures, applicable to the States by the Fourteenth Amendment, *Wolf* v. *Colorado*, 338 U. S. 25 (1949) could not be enforced properly except by the exclusion of illegally seized evidence, precedent was overruled and the Federal exclusionary rule, *Weeks* v. *United States*, 232 U. S. 383 (1914) was also made applicable to the States. *Mapp* v. *Ohio*, 367 U. S. 643 (1961). Likewise a procedure which made a criminal defendant in a capital case, incompetent to testify in his own behalf except by an unsworn statement, was declared to be a denial of the assistance of counsel. *Ferguson* v. *Georgia*, 365 U. S. 570 (1961). This, in a prior case, had been held to be one of the fundamental rights which due process required the States to respect. *Powell* v. *Alabama*, 287 U. S. 45 (1932). Even there a majority of the Court refused to declare as a violation of due process the actual incompetency of a criminal defendant as a witness, even though there was only one State in the common law world which retained this archaic

disqualification. In another case it was declared to be cruel and unusual punishment, another constitutional guarantee which the States had to respect (see *Louisiana* v. *Resweber*, 329 U. S. 459 (1947)), to imprison a man for being a drug addict, *Robinson* v. *California*, 370 U. S. 660 (1962). The modern medical opinions that drug addiction was a disease, the fact that only a few States made such a condition criminal and the similarity of this practice with the old method of punishing the insane were the relevant considerations which drew the Court to declare this law to violate due process.

On the other hand the Supreme Court has not been oblivious to the fact that the United States is a federal system with all the States free to a great extent to cope with their particular problems in any manner which they consider fit. Dowling, Cases on Constitutional Law, 599-607 (6th ed. 1959). Thus it was held that an appeal by the State in a criminal case was not a denial of due process even though this might not be allowed where the United States found itself to be the prosecuting government, *Palko* v. *Connecticut*, 302 U. S. 319 at 325-326. It has also been held that an acquittal in a United States Court did not bar a future prosecution by a State for the same crime. *Bartkus* v. *Illinois*, 359 U. S. 121 (1959). Neither was it a denial of due process for a State to allow a negative comment on a criminal defendant's failure to take the stand even though the Fifth Amendment guarantee against self incrimination would protect the accused in a Federal Court against such a practice. *Adamson* v. *California*, 332 U. S. 46 (1947). In some of these cases there were strong dissents. See *Adamson* v. *California*, *supra*, Mr. Justice Black dissenting, and strong historical authority for dis-

allowing these practices. See *Bartkus* v. *Illinois, supra,* Mr. Justice Black dissenting. It would be hard to deny that respect for State judgment in the exercise of its police power played a great part in forming the majorities in these cases. See *Bartkus* v. *Illinois, supra.*

It is difficult to see how the instant procedure which allowed a full opportunity for the appellant to present his case in the trial of the basic issues and which later gave him an adequate chance to act in good faith with the Judge and thus avoid the body execution can be compared with methods which have been found to be unconstitutional. It cannot be said that the order for a body execution in this case violated "fundamental principles of liberty and justice which lie at the base of our civil and political institutions". This was not a case where an old discredited practice abandoned in all other jurisdictions was enforced to deprive appellant of his constitutional rights. *Cf. Ferguson* v. *Georgia,* 365 U. S. 570 (1961). Nor was he punished for what the weight of modern authority would call a disease. *Cf. Robinson* v. *California, supra.* It would appear that this practice, accepted by half of the States, would be much more reasonable and therefore more acceptable than those forms of double jeopardy which have been allowed especially since ability to comply is so important in the application of Section 764.

**B. Procedures like the instant one, which are consistent with a State's needs and which are based on a tradition which continues to have present validity are not unconstitutional.**

The petitioner has added to his brief sections from the newly enacted Civil Practice Law and Rules of the State of New York which carry over Section 764 of the Civil Practice Act into the newly enacted law and rules. After years of study, review and revision, the people of the State of New York, a highly commercial jurisdiction, deemed it necessary to retain the provisions of Section 764 although in a somewhat different form.

Courts seldom disturb procedures adopted and continued over the years as still fitted to the States' own particular circumstances. See *Coler* v. *Corn Exchange Bank*, 250 N. Y. 136 (1928). A Delaware practice requiring a defendant in a foreign attachment action to post special bond to satisfy any eventual judgment before being allowed to defend on the merits, when challenged as being contrary to due process, was upheld by the Supreme Court. *Ownby* v. *Morgan*, 256 U. S. 94 (1921). The Court found that the practice was a custom of England which was adopted in many States at the time of independence as being fitted to their circumstances. As to the hardship which the rule caused to the defendant the Court stated:

> "However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform."

In addition to the constitutional principle that due process demands deference to "fundamental principles of liberty and justice" there is also the historical standard of due process requiring a practice to conform to "those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 Howard 272, 276-77 (1855). Imprisonment for debt was established in all the colonies and remained after the Revolution. See, *e.g.*, Shaiman, The History of Imprisonment for Debt and Insolvency Laws in Pennsylvania as They Evolved from the Common Law, 4 Am. J. Legal History 205 (1960); Note, *supra*, 42 Iowa L. Rev. 306. When agitation against it was occurring in England the United States was also affected. The Stilwell Act abolishing imprisonment for debt in New York was one of the leading legislative efforts of reform. The English concern for the prevention of fraud was manifested likewise in the United States. While fraud is still of major concern in the debtor creditor relationship, the collection of judgments has become of primary importance because of the ease with which a debtor can fraudulently conceal his assets. See *Reeves* v. *Crownshield*, 274 N. Y. 74, 76, 8 N. E. 2d 283, 284-85 (1937), citing Levien, The Collection of Money Judgments, N. Y. Leg. Doc. No. 50F (1934).

Section 764 of the New York Civil Practice Act is an attempt to deal with both of these problems. It is a fair attempt because it gives the creditor an effective remedy against the deceitful while giving the debtor a chance to

show that he is willing to make amends. Even after imprisonment the fraudulent debtor is not remediless for he may apply for his discharge by doing exactly what he failed to do before the Court issued the execution. New York Debtor and Creditor Law, Art. 5, Secs. 120-137. The statute on its face requires imprisonment for three months. New York Debtor and Creditor Law, Art. 5, Sec. 122. But it has been construed as not being vindictive and there are cases discharging fraudulent and other wrongful debtors when they have done what they could and where continued imprisonment would serve no useful purpose. *Sam Kass Corp.* v. *Kass*, 165 Misc. 858, 1 N. Y. S. 2d 783 (Municipal Ct. N. Y. C. 1937); *In re Snyder*, 155 Misc. 616, 280 N. Y. S. 257 (Sup. Ct. 1934), affd. per curiam 244 App. Div. 784, 280 N. Y. S. 259 (1st Dept 1935).

When all the relevant factors are considered, it would appear that the instant procedure is a reasonable course of action by a commercial jurisdiction to prevent and to protect its inhabitants against fraud and the fraudulent concealment of assets and to preserve the authority of its judgments and courts. The appellant did not show any respect for this legitimate concern of the State. He wilfully defaulted in the trial of the issue of his fraud. When the time came for him to make a full disclosure of his means and give a reasonable plan to pay the judgment he persisted in arguing issues which had already been decided against him and abandoned the pertinent issue of his present good faith.

It would be difficult to imagine, under the due process clause of the Fourteenth Amendment, how a State could be denied the power to give an effective remedy to a defrauded creditor and to preserve the dignity of its

Courts against those who have respect for neither. The paucity of cases which have arisen under Section 764 is an added indication that it is not oppressive and generally accomplishes its purpose of forcing wrongdoers to make amends, so far as they are able, to those they have wronged.

## POINT III

**New York's procedure is in accord with Federal policy.**

### A. The Federal law of imprisonment for debt in the Federal Courts, follows the remedies provided by the States.

Imprisonment for debt is abolished as a remedy in the Federal Courts on the same basis including any modifications, conditions or restrictions as it has been abolished in the State in which the Federal Court sits, 28 U. S. C. Sec. 2007(a) (1958). State procedures are also followed as to any jail liberties or other privileges which an imprisoned debtor enjoys in such a State, 28 U. S. C. Sec. 2007(b) (1958). This law has been interpreted to give suitors the same remedies regardless of whether they choose to sue in State or Federal Courts. *Hayes* v. *Canada A. & P. S. S. Co.*, 184 Fed. 82 (1st Cir. 1911); *Low* v. *Durfee*, 5 Fed. 256 (C. C. Mass. 1880); *U. S.* v. *Walsh*, 28 Fed. Cas. No. 16,635 (D. Or. 1867). The policy of respecting the State's remedies which is embodied in this provision was further strengthened in 1939 when the Federal Rules of Civil Procedure were adopted. Rules 64 and 69. The Rules, whose main function was to provide a unified practice in the Federal Courts, made arrest and body execution

conform with the local State practice. From this it can be seen that after 1839 when the first Federal statute was passed conforming the Federal Courts to State procedures, 5 Stat. 321 (1839) it has been the Federal policy to follow the States as regards execution against the person. The recent changes promulgated by this Court in the Federal Rules contained no alterations in this area and indicated that there is no current policy for changing the Rules which adopt State remedies in the Federal Courts.

**B. A procedure very similar to the instant one has been accepted by the Supreme Court in its supervision over The Federal Bankruptcy Courts.**

The Supreme Court has often had before it the problem of the legality of imprisoning a bankrupt for contempt for failure to turn over assets which have been determined in a civil proceeding to be wrongfully in his possession. In such a case the bankrupt is said to carry the keys to the jail in his own pocket for he need only comply with the order to gain his release. *Maggio* v. *Zeitz*, 333 U. S. 56 (1948) citing *Penfield Co.* v. *SEC*, 330 U. S. 585, 590 (1947). The possibility of mistake as to his ability to comply has been recognized but has not stood in the way of the use of the remedy of civil contempt in these cases. *Maggio* v. *Zeitz*, *supra*; *Oriel* v. *Russell*, 278 U. S. 358, 365-66 (1929). Although there was some controversy over the burden of proof in both the proceeding prior to the turnover order and in the contempt proceeding itself (compare *Stuart* v. *Reynolds*, 204 F. 709, 717-719 (5th Cir. 1913) with *In re Epstein*, 206 F. 568, 570 (D. Pa. 1913) it has never been decided that the "beyond a reasonable doubt" test of crimi-

nal cases applied here. Such a contention was in fact expressly rejected by this Court. *Oriel* v. *Russell, supra.* Once the bankrupt was found to have possession of wrongfully withheld assets it was held that he must make some effort to convince the judge in the contempt proceeding that present compliance was impossible. *Maggio* v. *Zeitz, supra; Oriel* v. *Russell, supra; Mueller* v. *Nugent*, 184 U. S. 1 (1902). Just as in the instant procedure (see Justice Gellinoff's first opinion (R. 44-45)), the bankrupt is given a chance to prove that he no longer has the power to obey the Court. The following from Chief Justice Taft's opinion in *Oriel* v. *Russell, supra*, is appropriate as to whether the bankrupt's bare assertion need be considered as in good faith or not by the presiding judge. See Gotthilf's affidavit (R. 21, 22) and Charnas' answering affidavit (R. 23, 24).

> "But it is also true that the assertion may not be believed, and that the bankrupt may therefore be subjected to the usual pressure that follows willful disobedience of a lawful command, namely, the inconvenience of being restrained of his liberty."

The principles of *Oriel* v. *Russell, supra*, were reaffirmed in *Maggio* v. *Zeitz, supra*, which made the present ability of the bankrupt to comply, the touchstone of this whole contempt practice.

There is a great similarity between the application of Section 764 and the turnover procedure referred to above. The addition of the judge's discretion in Section 764 makes the proceeding in the nature of a civil contempt. This can be seen by the interchangeability of orders ordinarily used only for contempt in Section 764 proceedings and the use of a Section 764 judicial discretion in a proceeding for contempt. The singular difference is that Section 764 only

applies to certain types of action while contempt proceedings deal with every action where a court seeks to enforce its orders, primarily for the benefit of a private party but also to preserve its authority.

If the Supreme Court in its supervisory power allows imprisonment for failure to comply with civil turnover orders, surely this same Court will not hold unconstitutional a similar practice conducted for essentially the same purposes in a State. Compare *Mallory* v. *United States*, 354 U. S. 499 (1957) with *Stein* v. *New York*, 346 U. S. 156 (1953).

### C. The Supreme Court has refused to alter State remedies, which have a strong local purpose, even when it has been alleged that they conflict with Federal policy.

In *In Re Kessler*, 369 U. S. 153 (1962) the Supreme Court let stand a State remedy which was said to conflict with the policy behind the Federal Bankruptcy Act. The State of Utah made it possible for the victim of a negligent driver to suspend the driver's automobile license until a judgment based on the accident was paid. There was a provision in the statute making this possible even if the judgment-debtor had received a discharge in bankruptcy which would ordinarily relieve him of the judgment debt. To the claim that the Utah statute was contrary to the policy behind the bankruptcy law allowing a fresh start in life, Mr. Justice Frankfurter wrote for the majority:

> "A State may properly decide, as forty-five have done, that the prosepect of a judgment that must be paid in order to regain driving privileges serves as a substantial deterrent to unsafe driving."

Section 764 serves as a deterrent to those who would defraud others and then seek to evade a judgment recovered against them. It also serves to protect those who are the victims of such fraudulent schemes. It cannot be said that these would not be sufficient to withstand the hostility of the Federal Courts to execution against the person. However, it is submitted that there is no such hostility and that the Federal Courts have followed the States in applying these remedies and show concern, as do the States, that lawful judicial orders be obeyed in good faith and to the best of the ability of those to whom they are directed.

## POINT IV

**The petitioner has failed to exhaust the remedies available to him under New York Law.**

**We respectfully refer to the brief of the Attorney General of the State of New York, *Amicus Curiae*.**

## CONCLUSION

**Section 764 of the Civil Practice Act which allows a body execution against a fraudulent debtor who refuses to show the Court that he is now acting in good faith, is consistent with the due process clause of the Fourteenth Amendment.**

Respectfully submitted,

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